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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. OSCAR GAMBOA, Defendant and Appellant.	E053900 (Super.Ct.No. FVI901944) OPINION

APPEAL from the Superior Court of San Bernardino County. Miriam Ivy Morton, Judge. Affirmed.

Earl Carter and Associates, Sean A. O'Connor, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Karl T. Terp, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Oscar Gamboa, pled guilty to annoying a child (Pen. Code, § 647.6, subd. (a))[1] and petty theft with a prior (Pen. Code, §§ 484, subd. (a) & 666).[2] He was immediately paroled, having been credited on his prison sentence for the theft with presentence custody time. He appeals only his conviction for annoying a child. There is no certificate of probable cause in the record before this court.[3] (§ 1237.5.) Although appearing to challenge his conviction only on the basis of his assertion that the residency restriction of the lifetime sex offender registration requirement consequence of his plea to this offense can only be imposed if a jury finds facts supporting that requirement beyond a reasonable doubt, defendant actually makes a number of challenges to his plea, all of which we reject. We therefore affirm the judgment.

FACTS

On his change of plea form, defendant's initials appear next to the following, "If I plead guilty to any sex crime covered by Penal Code section 290, I will be required to register as a sex offender . . . ." At the time defendant committed this crime, section 290

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[1] Defendant was originally charged with sexual battery by restraint (Pen. Code, § 243.4, subd. (a)) and the complaint also stated, regarding this charge, "NOTICE: Conviction of this offense will require you to register pursuant to Penal Code section 290. Willful failure to register is a crime."

[2] All further statutory references are to the Penal Code unless otherwise indicated.

[3] Although defendant was represented below by the public defender, he personally filed his notice of appeal, which is a Misdemeanor Notice of Appeal. This court appointed Appellate Defenders, Inc. to represent defendant on appeal, but he substituted in retained counsel, who authored the briefs on his behalf. Neither defendant's public defender, defendant himself, defendant's attorney at Appellate Defenders, Inc. or defendant's retained attorney obtained a certificate of probable cause.

provided, in pertinent part, "Every person described in subdivision (c), for the rest of his . . . life while residing in California . . . *shall be required to* register . . . . [¶] (c) The following persons *shall be required to register*: [¶] Any person who . . . has been or is hereafter convicted in any court in this state . . . of a violation of Section . . . 647.6 . . . ." (§ 290, italics added.)[4] At the taking of his plea, defendant acknowledged to the court that he had initialed and signed his change of plea form. The signature was done under penalty of perjury. Defendant's attorney had signed the following declaration on the change of plea form, " . . . I personally read and explained the contents of the above declaration to the defendant; that I personally observed defendant sign said declaration . . . ." At the taking of the plea, defendant said he did not need more time to speak with his attorney before proceeding. Defendant told the court that he understood all his "penalties, punishments [and] future consequences . . . ." Defense counsel told the court that he had had adequate time to discuss all the issues with defendant, that he went over the declaration and plea forms with him and he was satisfied that defendant understood everything. The court found that defendant understood "all the consequences

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[4] Defendant is just plain wrong when he asserts in his reply brief that the residency restriction of section 3003.5 was imposed "as a result of [his] being on parole for a non-registerable/non-sex offense." Both the registration requirements of section 290 and the residency restrictions of section 3003.5 were imposed because defendant pled guilty to annoying a child, which *is* an offense listed in section 290 and *is* a "registerable/sex" offense. The fact that defendant was sentenced to 18 months in prison for the petty theft with a prior and the term for annoying a child was run concurrent to it did not change this. The provisions of section 290 are triggered by the offense of which a defendant is convicted, regardless of the offense for which he or she is placed on parole. The residency restriction of section 3003.5 is triggered by the fact that a defendant is required by section 290 to register.

and punishments" for the offenses he was admitting. After sentencing defendant,[5] the trial court said to him, "Within five days of today, you must register with law enforcement in the town where you're living under Penal Code 290 as a registered sex offender." Defendant said he understood this. The trial court continued, "And every year on your birthday and any time you move you must re-register. So you're going to have to register every year for the rest of your life." Defendant said he understood this. The trial court continued, "And you're going to have to register any time you move." Defendant said he understood this.

At the time defendant committed his crimes, section 3003.5, subdivision (b) provided, in pertinent part, " . . . [I]t is unlawful for any person for whom registration is required pursuant to section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather."

ISSUES AND DISCUSSION

Defendant first asserts that the record below is silent "as to advising [him] as to the right to a jury trial as to the effect or consequences and restrictions of Penal Code [section] 3003.5 at the time of his change of plea." This assertion presumes that a pleading defendant has a right to a jury trial concerning the restrictions imposed by 3003.5, a matter we will discuss later. Defendant's follow up assertion that he "would not have pled guilty to [annoying a child] had he known of the . . . [section] 3003.5 restriction . . . at the time of his plea and sentencing" is not a matter supported by the

[5] Defendant was released that day to go on parole the following day, having been credited against his 18 month sentence for 643 days of actual presentence custody.

record before us and is, therefore, not appropriately made in an appellate brief. (See *People v. McClellan* (1993) 6 Cal.4th 367, 378 (*McClellan*).)[6] Moreover, defendant's failure to obtain a certificate of probable cause forecloses his claim. (See *People v. Kaanehe* (1977) 19 Cal.3d. 1, 8 (*Kaanehe*); *People v. McEwan* (2007) 147 Cal.App.4th 173, 178 (*McEwan*).)

Next, defendant asserts that the record is silent "as to advising [defendant] as to the effect or consequences and restrictions of mandatory parole consequences of Penal Code 290 lifetime registration at the time of his plea." If, by this, defendant is asserting that he was not informed before or at the time he entered his plea that he would have a lifetime registration requirement as part of that plea, the record, as discussed above, belies it. Both before defendant entered his plea, i.e., at the time he initialed and signed the change of plea form, at the time he entered his plea and at the time he was sentenced, he was informed of his obligation to register, as set forth above.

Next, defendant appears to suggest that due to reports that were authored by three experts examining defendant *in 2009* pursuant to section 1368, which note certain mental abnormalities exhibited by defendant *at that time or previous to it*, the trial court should

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[6] Defendant acknowledges the holding in *McClellan* that an assertion in the defendant's notice of appeal that, had he been informed of the registration requirement, he would not have pled guilty, "is not a proper component of the record on appeal." (*McClellan*, *supra*, 6 Cal.4th at p. 378.) However, defendant inexplicably attempts to distinguish that holding from the case here because he asserts that he was "prejudiced" by the imposition of the residency restriction. No doubt the defendant in *McClellan* was no less "prejudiced" by the imposition of the registration requirement there—still, the California Supreme Court held that such an assertion is inadequate to support the requirement that defendant be prejudiced by the failure to be advised of a consequence of his plea.

not have, on May 26, 2011, accepted defendant's plea. Besides the difference in time, and an intervening finding that defendant had been restored to competency, we note that the judge who reviewed these reports was not the same judge who accepted defendant's guilty plea.

Defendant next appears to suggest that because the mental abnormalities he had at the time or before are noted in reports authored in May 2010, October 2010 and March 2011, concerning his progress while under a section 1370 commitment for incompetence, the trial court should not have allowed defendant to plead guilty on May 26, 201l. As before, whatever mental condition defendant had on those dates or before had nothing whatsoever to do with his ability to plead at the later date. Moreover, as already stated, after those reports were authored, defendant was certified by his treating doctors as having been restored to competency and the court that later accepted his guilty plea found him to be competent and reinstated criminal proceedings. Defendant was represented by counsel at the time he initialed and signed the change of plea form and at the time he entered his plea. If there was any doubt about his mental ability to do so, it would have been up to his attorney to bring this to the trial court's attention. We presume in the absence of such an assertion that defendant suffered from no mental impairment that prevented him from properly entering a plea, understanding its consequences and his rights.

As to defendant's additional suggestion that he might have been on psychotropic medication at the time of his plea, defendant, himself, concedes that he told the court that he was not taking any drugs or medicine and there was no reason he might not understand

what was going on and if he was taking any medication, it was not affecting his ability to understand what was going on.[7] Nothing more is required. Next, we observe that if defendant was impaired when he entered his plea, either by his psychiatric condition or by whatever medication he might have been taking, he should not be appealing *only* his plea to annoying a child, but should also be appealing his plea to petty theft with a prior, which he states he is not. Finally, defendant's failure to obtain a certificate of probable cause forecloses his claim. (*People v. Laudermilk* (1967) 67 Cal.2d 272, 282; *McEwan, supra*, 147 Cal.App.4th at p. 178.)

Turning next to what appears to be defendant's major contention, defendant asserts that the issue he addresses is currently pending before the California Supreme Court in three other cases. He is mistaken.

In the first of those cases, *People v. Mosley* (2010), review granted January 26, 2011, S187965, the issue is whether a sentencing court may, *in its discretion*, impose a lifetime registration requirement, and, consequently, the section 3003.5, subdivision (b) residency restriction, on a defendant who is convicted by a jury of a crime for which

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[7] Defendant quotes the following from the hearing on the taking of the plea,

"Q. THE COURT: Are you currently under the influence of alcohol, drugs, medicine, or is there any other reason why you might not understand what's going on here today? [¶] . . . [¶]

"A. THE DEFENDANT: No…

"Q. THE COURT: And if you are taking any medication, is it affecting your ability to understand what's going on . . . ? [¶] . . . [¶]

"A. THE DEFENDANT: No."

Appellate counsel for defendant asserts, concerning this exchange, "The record is unclear as to what part of the court's inquiry [defendant] was responding to. There is no further inquiry as to what . . . the trial court meant by 'what's going on.'" We have no response to this other than to note that it is absurd.

registration is *not* mandatory under section 290 without a jury finding beyond a reasonable doubt the facts which support the imposition of that restriction. At its core, the issue in *Moseley* and in the other two cases defendant cites and for which the California Supreme court has granted review, i.e., *In re S.W.* (2010), review granted January 26, 2011, S187897 and *In re J.L* (2010), review granted March 2, 2011, S189721, is whether the residency requirement of section 3003.5 increases the penalty for the triggering offense beyond its statutory maximum such that *Apprendi v. New Jersey* (2000) 530 U.S. 466 requires facts supporting the imposition of the restriction be found by a jury beyond a reasonable doubt.[8] In the two juvenile cases, the issue is whether the residency restriction can be imposed on a delinquent minor who does not have his or her guilt of the offense for which registration, and thus, the residency restriction, is *mandatorily imposed* because there is no jury trial available for delinquent minors. None of these cases has anything to do with the instant case, where the defendant admitted his guilt of the offense that made the registration requirement mandatory, which, in turn, made the residency restriction mandatory. By pleading guilty to annoying a child, defendant was *required* by section 290 to register, and, as a consequence of that, to abide by the residency restriction of section 3003.5. By pleading guilty, defendant gave up any right to have a jury determine, beyond a reasonable doubt, the fact triggering the registration and residency requirements, which, of course, was his guilt of the annoying a child offense. If defendant wishes to assert that he was unaware at the time of his plea

[8] All three cases come out of Division Three of this court.

that the residency requirement would be a consequence of his admission to annoying a child, that is an entirely different matter, and, as we have already stated, one not to be asserted here, and certainly not in the absence of a certificate of probable cause. (*Kaanehe, supra,* 19 Cal.3d at p. 8; *McEwan, supra*, 147 Cal.App.4th at p. 178.)

Defendant's assertion that he was not advised of the nature of the charge of annoying a child is meritless and also barred by his failure to obtain a certificate of probable cause. What advisements defendant received by way of the change of plea form and what occurred at the taking of the plea are all that is necessary for the record to demonstrate that defendant understood the nature of the charge.

Next, defendant asserts that he was not informed of the *lifetime* aspect of his registration requirement until after he had entered his plea. While neither the change of plea form nor the statements of the court before the plea was accepted expressly referred to this aspect of the registration requirement, in order for this court to even contemplate vacating defendant's admission on the basis that he did not know the registration requirement was lifelong, defendant would have to have obtained a certificate of probable cause (*ibid*) and used a vehicle other than an appeal in which he merely asserts that he would not have pled had he been aware of this aspect of the registration requirement. (See *McClellan, supra,* 6 Cal.4th at pp. 367, 378.) The fact that when the trial court made it clear during sentencing that the requirement was lifelong and defendant expressed no surprise or objection means that on the record before this court, there is no showing that defendant was not aware of this aspect of the consequence of his plea. (*Ibid.*) Defendant cites no authority holding that a trial court must inform a defendant,

before pleading guilty, that the registration requirement of section 290 is lifelong. The same is true as to the residency restriction of section 30003.5.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

MILLER
J.